

Appl. No. 10/806,596

Amdt. dated January 17, 2006

Reply to Office action of December 14, 2005

No additional fee is due because the number and type of newly added claims are the same as the number and type of originally presented, but now cancelled claims. Nevertheless, an appropriate authorization to charge or credit the deposit account of applicant's attorney is enclosed in the required duplicate original form -- to be used if necessary.

Amendments to Drawings:

In view of the Examiner's comments on the "at least one mixing tool", and the reference sign 136, the specification, Figure 1, and Figure 4 have been changed to provide for mixing tool 136. Replacement sheets with modified drawings are included within this reply. None of the additions to the specification or the drawings are new matter. First, the claims as originally filed mention the mixing tool. The use of a mixing tool within a blender is within the knowledge of one of ordinary skill in the art and therefore the mere mentioning of a mixing tool in the claims meets the enablement and written description requirements of 35 U.S.C. 112, Paragraph 1. In addition, the originally mentioned blade assembly within the specification is a mixing tool. As originally filed the specification described the relationship between the chopper and the blade assembly. Consequently, coupled with the claims as originally filed the addition complies with the requirements of 35 U.S.C. 112, Paragraph 1.

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**REMARKS/ARGUMENTS**

The Examiner required restriction of the claims under 35 U.S.C. 121. The Examiner has grouped Invention I as claims 1-9 and claims 18-20. Invention II is grouped as claims 10-17. Consequently, an affirmation of the provisional election is discussed in addition to traverse of the restriction requirement.

Furthermore, Claim 1-4 and 18 stands rejected under 35 U.S.C. 102(b) as being anticipated by United States 5,090,815 to Bohle (hereafter Bohle). Claims 5-9, 19 and 20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Bohle. The rejections under 35 U.S.C. 102 and 103 are respectfully traversed.

**PROVISIONAL ELECTION UNDER 35 U.S.C. 121 WITH TRAVERSE**

The Examiner has separated the claims into Invention I (claims 1-9, 18-20) and Invention II (claims 10-17). As per the telephone conversation on November 30, 2005, the applicant provisionally elects Invention I. Claims 1-9, 18-20 are directed to an adjustable height blender apparatus. Claims 10-17 are directed to a method of blending. The Examiner relies on MPEP 806(e) as the basis for distinctness of the claims. More particularly, the Examiner believes that the process as claimed can be used to practice another materially different apparatus. The example provided by the Examiner is an apparatus missing "a filling means and a discharge means" but instead just having a single opening.

Applicant respectfully disagrees that the example is an apparatus that is functional with the claimed method. Two distinct filling and discharge means are required with this invention because gravity is the intended and primary force causing the discharge of the material in order to recover the product. This characteristic is inherently present since the blender must be lifted in order to recover the product. Thus discharge means must be positioned such that, when an opening is created for discharge of the mixed materials, gravity naturally causes the materials to flow toward the earth for

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recovery. As a result, materials could not be introduced into the mixer through a single opening working as a discharge means since the natural force of gravity would force the materials out of the blender. As a consequence, applicant respectfully submits that the Examiner has not provided a working example of a different apparatus practicing the claimed method.

#### **RESPONSE TO 35 U.S.C 102 REJECTIONS**

Claim 1-4, and 18 stand rejected under 35 U.S.C. 102(b) as anticipated by Bohle. Additional limitations introduced into the claims and arguments provided traverse the rejections. Bohle does not contain all of the limitations of the claims as amended.

Anticipation cannot exist in light of the decision rendered in In re Bond, 910 F.2d 831, 15 USPQ2D 1566 (Fed. Cir. 1990).

"For a prior art reference to anticipate in terms of 35 U.S.C. Section 102, every element of the claimed invention must be identically shown in a single reference. These elements must be arranged as in the claim under review,.....

Additionally, the Examiner's attention is directed to the decision in:

Structural Rubber Prod. Co., v. Park Rubber Co., 749 F.2d 707, 223 USPQ 1264 (Fed. Cir. 1984).

"Anticipation can only be established by a single prior art reference which discloses each and every element of the claimed invention. Anticipation is not shown even if the differences between the claims and the prior art references are 'insubstantial' and the missing elements could be supplied by the knowledge of one skilled in the art."

Accordingly, this rejection is respectively traversed and withdrawal thereof is requested. Claim 1 stands rejected under 35 U.S.C. 102(b) as being anticipated by Bohle. However, the amended claim 1 contains claim limitations not present in Bohle. First, the cover in Bohle is not removable from the batch blender and the lifting assembly. Second, the

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low position in Bohle does not allow for the removal and installation of the cover. These limitations are significant since one of the objectives of the invention is the capability of mixing ingredients in a lowered position. Thus, the structure claimed for the cover can close the ingredients in order to safely permit mixing and reaction while the receiver is in a lowered position. Consequently, the closed cover maximizes the amount of time the ingredients are mixed and permits mixing while the receiver is being raised. Consequently, the Bohle patent cannot anticipate claim 1.

More specifically, the cover in Bohle is permanently attached to the top of the lifting means (Bohle, Figure 1, Elements 6,6a). As a result, the cover is not capable of disconnecting from Bohle's batch blender and lifting assembly and is fixed at the top of the lifting assembly. In contrast, the claimed structure of Claim 1 as modified requires a cover which is removable from both the batch blender and the lifting assembly.

Also, while there are several relationships in the Bohle patent which could be interpreted by the Examiner as satisfying the "low position" for the receiver, the "low position" in Bohle does not permit both the removal and the installation of the cover. The relevant text in Bohle, Column 5, Lines 12-36 states:

...the piston and rods 8,9 are designed to positively move the vessel but not the cover. The latter can be lifted by the vessel and can descend in response to the downward movement of the vessel. Furthermore, the mixing apparatus comprises means for limiting the extent of movability of the cover 6 along the guides 5 and 7. Such limiting means comprises two upright tracksWhen the followers 15-18 reach the lower ends of channels in the respective tracks 11, 10, 14, 12, the vessel 2 can descend relative to the arrested or intercepted cover 6 so that its top is exposed for reception of a fresh charge of granular, pulverulent and/or liquid material which is to be stirred, mixed kneaded, agglomerated and or/otherwise treated while a sealing device 6a at the underside of the cover 6 seals the open top of the

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vessel. At such time, the cover 6 can be held in its upper end position, its lower end position, or in any intermediate position, as long as its sealing device 6a properly engages and seals the vessel 2 at the open end of the latter.

Furthermore, Bohle states in Column 6, Lines 53-57 states:

The cover 6 can be provided with a sealable inlet which makes it possible to admit into the vessel 2 a fresh charge of one or more flowable materials while the sealing device 6a of the cover engages the open top of the vessel.

As a result, it is possible to interpret two possible "low positions" for the Bohle patent. First, the vessel being lowered, consequently lowering the cover into an arrested or intercepted position thereby exposing the open top for filling of the vessel might be interpreted as a "low position" for the "receiver". If the cover is thereby not in contact with the cover (either 6, or 6a) by lowering the vessel in order to fill the vessel then the cover is removed in the "low position". However, once the cover is removed in the low position it cannot be simultaneously installed in the low position. This is because the cover in Bohle remains fixed to the top of the lifting assembly. As a result, once the cover is removed in the "low position" it cannot simultaneously be installed in that same position.

Second, a more likely interpretation of the "low position" in the Bohle patent is when the open top is exposed yet remains in contact with the sealing device 6a of the cover. Consequently, in this interpretation of the "low position" the vessel remains in contact with the cover and a sealable inlet is provided for filling the vessel. Since the cover remains in contact with the vessel for filling purposes and is fixed to the top of the lifting assembly, it cannot be removed in the "low position".

Finally, these "low positions" are mutually exclusive. The Examiner must keep in mind that the low position is for filling purposes. Thus, once the user of the Bohle patent

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determines which of the above positions is the "lower position" the user cannot simultaneously alternate to another position for filling purposes. For example, if the user of the Bohle patent decided to fill the vessel by exposing the open top without connecting sealing device 6a to the vessel, then this is the "lower position". The filling purpose is being accomplished by permitting material to enter the exposed open area at the top of the vessel. In the alternative, if the user decided to fill the vessel with connection of the sealing device 6a to the vessel, then a sealable inlet or some other means must be used in the cover for filling purposes. (The means of filling the device must be through the cover in order for the Bohle vessel to be in a "low position" while connected to the sealing device 6a. If the filling of the device were accomplished by providing a means in the body of the vessel, then the lowering of the device while it remained connected to the sealing device 6a would serve no filling purpose) As a result, the "low position" is the point where the Bohle device exposes the open top yet remains connected to the cover through the sealable device 6a.

This result is required because the "low position" is determined by the filling purpose. Once the user determines a method of filling the receiver, he has simultaneously determined what qualifies as a "low position". As a result, the Bohle patent does not contain a cover which can simultaneously be installed or removed in the "lower position". In summary, the fixed cover of Bohle will not allow this structure.

Next, claim 2 and claim 18 cannot be interpreted as reading on Bohle. First, claim 2 is dependent on claim 1 and therefore Bohle is missing the limitations discussed above of Claim 2. Next, Claim 2 and claim 18 as modified require that the mixing tool be secured within the receiver. This assists in the mixing process and allows the mixing to occur while the receiver is in a "low position". As a result, claim 2 and claim 18 do not read on the Bohle disclosure. Bohle discloses mixing tools secured to the cover which is permanently attached to the top of the batch blender (Bohle, Figure 1, Elements 3, 3a). As a result, Bohle disclosure cannot mix the ingredients in a "low position".

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Because claims 3 and 4 are dependent on claims 1 and 2 and Bohle does not contain the above recited elements, claims 3 and 4 are not anticipated by Bohle.

#### RESPONSE TO 35 U.S.C 103 REJECTIONS

Claims 5-9 and 19-20, stand rejected as being obvious in view of Bohle. The rejections are respectfully traversed. First, Bohle claims 5-9 are dependent and contain all of the limitations of claims 1 and 2. Furthermore, claim 19-20 are dependent on claim 18. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970).

As discussed above, the disclosure in Bohle does not contain 1) a cover removable from the batch blender and the lifting assembly, 2) the low position allowing the removal and installation of the cover, and 3) a mixing tool connected on the inside of the receiver. Furthermore, nothing in Bohle suggests the aforementioned modifications. Bohle was designed to work with a cover and mixing tools attached to the top of the lifting assembly. Nothing in Bohle suggest making the modifications stated above. Thus, claims 5-9 and 19-20 cannot be rendered obvious in view of Bohle.

Applicant's advantages are clearly disclosed, plainly discussed and heavily emphasized in applicant's claims and specification. These factors bring this application into the realm of *U. S. v. Adams*, 383 U.S. 39, 48-49; 148 USPQ 479, 482 (1966), which includes the following interpretation of the patent law:

"Novelty and nonobviousness, as well as utility, are separate tests of patentability. All must be satisfied in a valid patent.

"While patent claims limit invention, and specification cannot be utilized to expand patent monopoly, claims are construed in light of specification and both are read with a view to ascertaining the invention."

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Furthermore, the mere fact that Bohle shows the agitator shaft of 3A with two hubs does not render the separability of the mixing tools from the agitator obvious. The mere fact that an apparatus contains more than one section does not suggest that the sections are separable. Otherwise, the separability of every multiple section apparatus with distinct parts would be rendered obvious. Instead, as in the case of *In re Dulberg* 129 USPQ 348 (CCPA 1961), the obviousness of the separability of the parts requires a motivation to access or reach a particular section. The Examiner has not pointed to a motivation for the separability of these parts. As a result, applicant respectfully submits that the Examiner has not established the necessary motivation to make the "releasably secured" modification in claims 5 and claim 19.

#### RESPONSE TO 35 U.S.C 112 REJECTIONS

Claims 2-9 and 18-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to point out and distinctly claim the subject matter which applicant regards as his invention. The modifications introduced into the claims are believed to cure the defects cited by the Examiner. More particularly, Claim 2 has been modified to include "an agitator" instead of "agitating means". Claim 5 now claims "the agitator" instead of "the agitating". Furthermore, claim 18 now states has "an agitator" instead of an "agitating means". Claim 19 now claims "the agitator" instead of "the agitating".

#### CONCLUSION

Accordingly, all rejections having been overcome by amendment or traversed by remarks, reconsideration and allowance of the instant application is respectfully requested. Applicant's attorney remains amenable to assisting the Examiner in the allowance of this application.

Applicant respectfully requests that a timely notice be issued in this case.

Respectfully submitted,

By:

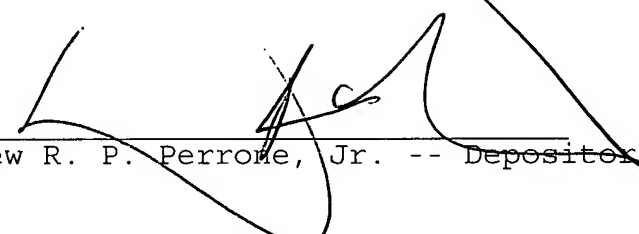
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I hereby certify that this correspondence is being deposited via first class mail addressed to: Mail Stop Non-Fee Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on or before January 17, 2006.

  
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE PRIMARY EXAMINER

Appl. No. : 10/806,596  
Applicant : Howard W. Bongratz  
Filed : March 23, 2005  
Title : Variable Height, Multiple Position  
Batch Blender Assembly

TC/A.U. : 1723  
Examiner : David L. Sorkin

Docket No. : Y3.0173

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Alexandria, VA 22313-1450

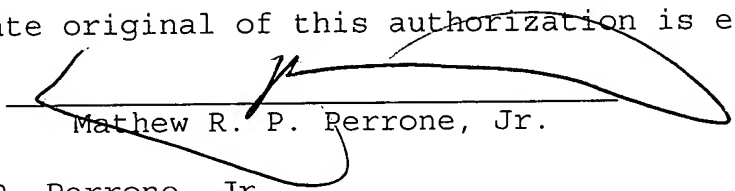
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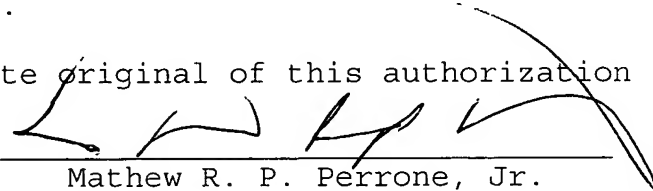
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